IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

MELODI M. LAMP,)	
Plaintiff,)	Civil No. 3-99-cv-30121
v.)	
CITY OF BETTENDORF, A Municipal Corporation, and WARREN J.BEINE,))	RULING ON DEFENDANTS' MOTION FOR SUMMARY
Defendants.)	JUDGMENT

This matter is before the Court on defendants' motion for summary judgment (#15). Plaintiff Melodi Lamp filed her complaint on July 8, 1999. In four counts she brings essentially three causes of action: (1) against defendant Beine, a Bettendorf police officer, under 42 U.S.C. § 1983 for alleged violation of her Fourteenth Amendment due process rights¹ resulting from Beine's alleged failure to adequately investigate a motorcycle accident in which Lamp was injured (Count I); (2) against Beine under state law for negligent (or in the alternative, willful, wanton, and reckless) failure to adequately investigate the accident (Counts II and III); and (3) against the defendant City for respondeat superior liability on

 $^{^{\}rm 1}$ Plaintiff states her § 1983 claim under the Fourth and Fourteenth Amendments to the federal constitution, but as the former concerns searches and seizures, it is more properly brought under the Due Process Clause of the Fourteenth Amendment.

all theories pleaded against Beine. Plaintiff seeks compensatory damages.

Federal question jurisdiction is asserted. 28 U.S.C. §§ 1331 and 1343(a)(3). The Court has supplemental jurisdiction of the state law claims. 28 U.S.C. § 1367. The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on December 2, 1999. See 28 U.S.C. § 636(c).

I.

Defendants' motion for summary judgment is subject to the following well-established standards. A party is entitled to summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Helm Financial Corp. v. MNVA Railroad, Inc., 212 F.3d 1076, 1080 (8th Cir. 2000)(citing Fed. R. Civ. P. 56(c)); accord Bailey v. USPS, 208 F.3d 652, 654 (8th Cir. 2000). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the

suit under governing law." <u>Hartnagel</u>, 953 F. 2d at 395 (quoting <u>Anderson v. Liberty Lobby, Inc.</u>, 477 U.S. 242, 248 (1986)); <u>see</u> <u>Rouse v. Benson</u>, 193 F.3d 936, 939 (8th Cir. 1999).

In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented.

Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000). The court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them. Matsushita, 475 U.S. at 587; accord Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993).

II.

The factual premise of plaintiff Lamp's claims is as follows. Lamp was the passenger on a motorcycle being driven by Kenneth S. Koehler in the early morning hours of July 9, 1997. Koehler had been drinking and lost control of the motorcycle. Lamp was seriously injured. Lamp contends the investigating officer, defendant Beine, failed to adequately investigate the accident, and that if he had done so, he would have learned that Koehler was intoxicated, should have been arrested and a

criminal prosecution thereby initiated. Because of the inadequate investigation, Lamp claims she lost an opportunity as the victim of a crime to obtain restitution and her ability to recover punitive damages from Koehler and maintain a dram shop action against the bars which served him has been impaired.

For the purposes of the present motion for summary judgment, the following facts appear to be undisputed.

Defendant City of Bettendorf (City) is an Iowa municipal corporation. Warren J. Beine is a sergeant on the City's police force. At the time of his deposition in November 1999, he had been a police officer for nineteen years. (Beine Depo. at 4-5). During that time he estimated he had made 400 to 500 arrests of intoxicated drivers. (Id. at 13). Beine has training as an accident reconstructionist. (Id. at 5-6). In that capacity he estimated he investigated 200 to 250 accidents. (Id. at 12).

On July 9, 1997 at about 4:18 a.m. Kenneth S. Koehler, an off-duty police officer for the City of Davenport, was driving his motorcycle, a 1995 Kawasaki Ninja, with Melodi Lamp as his passenger. Koehler had a learner's permit for motorcycle operation which required he stay in sight of a licensed driver. Koehler and Lamp were involved in an single-vehicle accident after Koehler lost control of the motorcycle as he rounded a

bend on a dead-end street. Lamp was thrown from the motorcycle and suffered serious injuries, including a skull fracture, closed head injury and facial scarring.

Sergeant Beine was dispatched to the scene, arriving at approximately 4:59 a.m. Koehler and Lamp had already been taken to the hospital when Beine arrived. Beine was not aware until he got to the scene that a Davenport police officer was involved. (Id. at 82, 84). He knew Koehler before the accident. Beine had seen him off and on while Koehler was a high school student and had given him some tickets. (Id. at 84). Beine investigated the accident scene, then went to the hospital, arriving at approximately 6:49 a.m. Beine interviewed a witness, Jason Willey, Koehler and several nurses at the hospital. Koehler told Beine he had a total of four or five beers and a "shot" at two different bars, America's Pub and Halftime Sports Bar, prior to the accident, all before he returned to his home around 2:00 a.m. Koehler told Beine that he, Lamp and several other people then went swimming at a neighbor's pool and then decided to take a motorcycle ride with some friends, Jason Willey, another Davenport police officer, and his wife. Willey was behind Koehler as their bikes approached the dead-end road, though apparently Koehler was not within his sight at the time Koehler lost control.

Beine checked Koehler's breath for the smell of alcohol, but discovered none. He then administered a horizontal gaze nystagmus test which Koehler passed. Beine asked the nurses if they had noticed the smell of alcohol on Koehler. They indicated they had not. Beine could not conduct any other field sobriety tests (such as the "walk-and-turn" and "one-legged stand") due to Koehler's injuries. Beine was not able to talk to Lamp due to her injuries. Beine subsequently found out Koehler did not have liability insurance.

Beine filed an accident report and concluded the cause of the accident appeared to be a combination of excessive speed and Koehler's inexperience driving motorcycles. He also concluded alcohol did not play any significant role in the accident. (Ex. D). Beine did not issue a citation to Koehler for the accident and no criminal charges were brought. (Ex. 13, Beine Depo. at 93). He did send a copy of his accident report to the Davenport police chief with the expectation that Koehler's chief would take some action. (Id.)

Lamp filed a state civil action against Koehler, her own insurance company and her mother's insurance company for damages sustained in the accident. She also filed a state dram shop action against Halftime Sports Bar and Grill and America's

Pub. Both actions were pending at the time the present motion was filed.

III.

A. Section 1983

Plaintiff must prove that she has been deprived of "rights, privileges, or immunities secured by the Constitution or laws of the United States" by an individual acting under color of state law. Comiskey v. JFTJ Corp., 989 F.2d 1007, 1010 (8th Cir.1993)(quotation omitted). There is no question here that Sergeant Beine was acting in his capacity as a police officer for the City of Bettendorf.

"Section 1983 does not create substantive rights, . . . rather, state law establishes the property interest while federal constitutional law determines whether the state law property interest rises to a constitutionally protected property interest." Riley v. St. Louis County of Mo., 153 F.3d 627, 630 (8th Cir. 1998). The Supreme Court "traditionally has held that the Due Process Clause protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

Lamp claims that if an adequate investigation would have been done, Koehler would have been charged and convicted of any one of several crimes including operating while intoxicated causing serious injury or reckless driving causing serious injury. Iowa Code §§ 701.6A(1), (2) and (4). She would then have been entitled to restitution for "pecuniary damages" (all damages except physical and mental pain and suffering) as a victim. Iowa Code §§ 910.1, .2. Additionally, she argues that because of Beine's inadequate investigation, evidence of Koehler's intoxication was not developed and this has hampered her civil claims to the extent based on Koehler's intoxication.

The factual and legal assumptions which underlie Lamp's claims are suspect, but the Court will assume that Sergeant Beine's investigation was inadequate because he should have asked Koehler for a preliminary breath screening test which, if given, would have furnished reasonable grounds for a test of Koehler's blood (or, because of the personal injury accident, Beine should have proceeded directly to ask for a blood test), see Iowa Code § 321J.5, .6(1)(d), that such testing would have shown Koehler was intoxicated, that Koehler would subsequently have been convicted of offenses in connection with which Lamp would have been entitled to restitution, and her dram shop and punitive damages claims would have gained evidential support.

This is a long causal chain. It should be noted that while the Court will assume intoxication would have been established from testing, it is speculative on the summary judgment record that a breath or blood test would have shown Koehler to be intoxicated. Defendant's expert (a criminalist with the Iowa Department of Public Safety) has opined that Koehler did not consume enough alcohol to put him over the legal limit and that in the time elapsed between his drinking, the accident and Beine's interrogation, what alcohol he had consumed would have metabolized. (Ex. A attached to Reply).

The Court will also assume for the purposes of this ruling the doubtful propositions that Lamp had a protected property interest in a criminal cause of action which, upon an adjudication of guilty, would have entitled her to restitution for pecuniary damages, and further, that Beine's failure in his investigation to develop evidence helpful to Lamp's prospective civil causes of action resulted in a constitutionally cognizable deprivation of a protected property interest.

Lamp's complaint in her § 1983 claim that Beine "fail[ed] to properly investigate the intoxication" of Koehler is fundamentally an allegation of negligent deprivation of a property interest. See Complaint ¶ 40. Such claims are not actionable. In Daniels v. Williams, 474 U.S. 327, 334 (1986),

the United States Supreme Court held that "mere lack of due care . . . does not implicate the Due Process Clause of the Fourteenth Amendment." The reason is that the Fourteenth Amendment was intended to curb arbitrary governmental action, indeed the word "deprive" in the Due Process Clause connotes more than a negligent act. <u>Id.</u> at 330-31. <u>See County of Sacramento v. Lewis</u>, 523 U.S. 833, 849 (1998). The Due Process Clause is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." <u>Paul v. Davis</u>, 424 U.S. 693, 701 (1976). Were that so the Fourteenth Amendment would be trivialized. <u>Daniels</u>, 474 U.S. at 322.

That Lamp's § 1983 claim is out of bounds under <u>Daniels</u> is also clear from the Eighth Circuit's opinion in <u>Williams v. Soligo</u>, 104 F.3d 1060 (8th Cir. 1997). The defendant police officer, Soligo, impounded a truck, which plaintiff had bought from an abandoned vehicles auction, after the original owner recognized the truck. <u>Id.</u> at 1061. After investigation, Officer Soligo confirmed that plaintiff was an innocent purchaser and that the truck had indeed belonged to someone else. Soligo then released his investigative "hold" on the truck without advising plaintiff. Thereafter the original owner filed a claim for the truck and it was released to him. <u>Id.</u>

In upholding a judgment as a matter of law in favor of Officer Soligo, the Eighth Circuit addressed the flaw in plaintiff's theory of recovery: "In other words, Williams contends that in completing his investigative duties Soligo failed to protect Williams' property interest. That is a negligent deprivation claim barred by Daniels." Id. at 1062. See S.S. v. McMullen, 225 F.3d 960, 964 (8th Cir. 2000), petition for cert. filed (Dec. 8, 2000)(No. 00-946)(even gross negligence is not actionable under § 1983, quoting Sellers by and through Sellers v. Baer, 28 F.3d 895, 902-03 (8th Cir. 1994), cert. denied, 513 U.S. 1084 (1995)). The investigative failures alleged by Lamp likewise amount to a claim of negligent deprivation.²

Defendant is also entitled to the qualified immunity he claims in his summary judgment motion. "Qualified immunity shields state officials from civil liability when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Doe v.

 $^{^2}$ Lamp also contends that Beine "knowingly" failed to follow proper police procedure and, in connection with her state law claims, that he acted in "willful, wanton and reckless" and "intentional" disregard of her rights. Complaint $\P\P$ 24, 53, 59. To the extent these allegations may be seen as a claim that Beine acted with an intent to deprive Lamp of her due process rights, the Court does not believe that the summary judgment record, viewed favorably to her, could reasonably support such a conclusion.

<u>Gooden</u>, 214 F.3d 952, 955 (8th Cir. 2000)(quoting <u>Harlow v.</u> Fitzgerald, 457 U.S. 800, 818 (1982)). The Eighth Circuit

has established a three-part test to determine whether a government official is protected by qualified immunity: (1) the plaintiff must assert a violation of a constitutional or statutory right; (2) that right must be clearly established; and (3) taking all facts in a light most favorable to the plaintiff, there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right.

Lambert v. City of Dumas, 187 F.3d 931, 935 (8th Cir. 1999).³
Lamp, as the victim of a crime, did not have a clearly established constitutional right, derived from the Due Process Clause, to an adequate criminal investigation so that she could receive restitution or to assist her in maintaining a civil cause of action. A reasonable officer in Beine's position would not have known that failing to test Koehler for intoxication would deprive Lamp of a property interest in restitution, punitive damages, or a dram shop action.

Finally, § 1983 municipal liability can only be established by proof of a constitutional violation resulting from a municipal policy or pattern of misconduct, which is

³ The Court notes plaintiff's argument regarding Officer Beine's good faith. Good faith is not a factor in the qualified immunity equation. "The linchpin of qualified immunity is the objective reasonableness of the officer's actions. . . . " <u>Wilson</u> v. Spain, 209 F.3d 713, 716 (8th Cir. 2000).

neither pleaded nor proved here. Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403 (1997);

Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 691 (1978). "[A] municipality cannot be held liable under § 1983 on a respondent superior theory." Monell, 436 U.S. at 691.

B. <u>Negligence/Intentional Tort Claims</u>

Lamp's state law tort claims against Beine and the City are for negligent, or alternatively, "willful, wanton, reckless and/or intentional" acts arising from Beine's alleged failure to investigate Koehler's intoxication and the criminal conduct related to it. Complaint ¶¶ 54, 59. A municipality, and its employees, can only be held liable in tort under the Iowa Municipal Tort Claims Act, Iowa Code Ch. 670. The abrogation of governmental immunity found in that statute "means that the same principles of tort liability apply to municipalities and their employees as to other tort defendants" except as limited by the act. Hildenbrand v. Cox, 369 N.W.2d 411, 416 (Iowa 1985); see Nelson v. Steiner, 262 N.W.2d 579, 581-82 (Iowa 1978)(both the municipality and its police officer individually are liable for tortious conduct of the officer). For the purposes of this

motion the Court will assume that none of the relevant statutory exceptions are dispositive.⁴

Neither the City nor Beine is liable to Lamp for a negligent failure to investigate Koehler's intoxication. In Smith v. State, 324 N.W.2d 299 (Iowa 1982), the Iowa Supreme

There is a limitation on the right to recover punitive damages in the Iowa statute. The City is not liable for punitive damages. Iowa Code § 670.4(5). Sergeant Beine is subject to punitive damages only if "actual malice or willful, wanton and reckless misconduct is proven." Iowa Code § 670.12.

⁴ In its brief defendants suggest that the discretionary function exemption in Iowa Code § 670.4(3) applies to a police officer's investigation. Police officers necessarily enjoy a great measure of discretion in investigating crimes and, specifically, the Iowa Supreme Court has held that the Iowa statutes concerning the crime of driving while intoxicated "do not impose on peace officers a mandatory duty to take such persons into custody." Hildenbrand, 369 N.W.2d at 417. The absence of a mandatory duty is one prong of the discretionary function analysis. The governmental employee's exercise of judgment must also be "of the kind that the discretionary function was designed to shield. " Goodman v. City of Le Claire, 587 N.W.2d 232, 237 (Iowa 1998)(quoting Berkovitz v. United <u>States</u>, 486 U.S. 531, 536-37 (1988)). Under this second prong "the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment." Berkovitz, 486 U.S. at 539. It is not necessary in this case to determine whether Sergeant Beine's decisions about how to conduct his investigation and whether to arrest and initiate criminal charges against Koehler implicated a policy judgment so as to fall within the discretionary function exemption because, discussed later, Iowa law is clear Beine had as particularized duty to Lamp in these regards. The Court notes, however, that applying the Berkovitz analysis to a similar provision in the Federal Tort Claims Act, to which Iowa courts often look for guidance, Goodman, 587 N.W.2d at 236, the Eighth Circuit has held that the decision to make or terminate an arrest by a National Park Ranger is a discretionary function. <u>Deuser v. Vecera</u>, 139 F.3d 1190, 1195-96 (8th Cir. 1998).

Court held that public policy considerations required immunization of police officers from liability for negligence with respect to their investigations.

The public has a vital stake in the active investigation and prosecution of crime. Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence.

Id. at 301. Smith involved a claim of negligent investigation by a person who had been charged with murder and subsequently found not guilty. Id. at 299.

In <u>Hildenbrand</u>, the Iowa Supreme Court added a "corollary [to the] rule of non-liability of peace officers investigating criminal activity." 369 N.W.2d at 415.

The rule not only applies when the person allegedly harmed by a negligent investigation has been charged and arrested, but also when the allegedly negligent investigation results in no arrest.

Id. at 415. In <u>Hildenbrand</u> the defendant police officer stopped Hildenbrand's car and suspected Hildenbrand was intoxicated, but decided not to arrest him, giving Hildenbrand a citation for failing to have his vehicle under control instead. <u>Id.</u> at 413. Hildenbrand was allowed to drive away and shortly afterward was killed in another collision. His estate brought a wrongful death

action against the police officer and his municipal employer, claiming that the officer was negligent in failing to arrest Hildenbrand. Id. In holding that the officer had no common law duty to discover Hildenbrand's intoxication and arrest him, the court relied on Restatement principles concerning what common law duties of protection are owed by one member of the public to another. Id. at 415 (citing Restatement (Second) of Torts §§ 314, 314A, 315, 319 and 320 (1965)). The court found that absent a "special relationship" between the officer and Hildenbrand, there was no duty to protect Hildenbrand from harming himself. Id.

Later, in <u>Hawkeye Bank & Trust Co. v. Spencer</u>, 487 N.W.2d 94 (Iowa App. 1992), the Iowa Court of Appeals examined a claimed special relationship from the fact the police had told a murder victim "a special or extra watch" would be placed on her and her home to protect her from her former boyfriend who police believed was capable of carrying out a threat to kill her. <u>Id.</u> at 95. Allegedly the extra precautions were not taken, resulting in the death of the victim at the hands of the boyfriend. Relying on <u>Smith</u> and <u>Hildenbrand</u> the Court of Appeals found the promise of extra precautions did not create a special relationship, believing that such a holding would "discourage the police from making extra efforts to help citizens." <u>Id.</u> at

- 96. The court viewed <u>Hildenbrand</u> as standing for the proposition that there are only two exceptions to the general rule in Iowa that police are not liable for a negligent investigation:
 - 1. Where the police create the situation which places the citizen's life in jeopardy.
 - 2. Where the police take a citizen into custody or control.

Id.

Finally, in Mastbergen v. City of Sheldon, 515 N.W.2d 3 (Iowa 1994)(per curiam), a property loss case involving the robbery of a jewelry store with a silent alarm system monitored by the police, the Iowa Supreme Court rejected a claim that the City could be liable for inadequate police response to a report of a crime in progress. The court noted that it had rejected the idea police have "a particularized duty to protect individuals," referred again to the requirement of a special relationship in the Restatement, and repeated the two exceptions to the general rule of non-liability set out in Spencer. Id. at 4-5. See also Morris v. Leaf, 534 N.W.2d 388, 390 (Iowa 1995) (no particularized duty); Sankey v. Richenberger, 456 N.W.2d 206, 209 (Iowa 1990)(same).

It is clear from these cases that apart from the exceptions noted in <u>Hildenbrand</u>, <u>Spencer</u>, and <u>Mastbergen</u>, which are inapposite here, police in Iowa do not have an actionable

common law duty to either the perpetrator or the victim of an alleged crime with respect to the conduct of a criminal investigation or the decision to make an arrest and thereby initiate criminal proceedings. Without a duty there is no tort. Hildenbrand, 369 N.W.2d at 417.

As noted previously, the Complaint makes allegations that Beine acted knowingly, intentionally, willfully, wantonly and recklessly. There is no evidence in the summary judgment record which would reasonably support a finding that Officer Beine acted with any intent or purpose to prevent or hinder Lamp from recovering restitution, or a civil judgment for damages against Koehler or the dram shops. The undisputed facts remain that neither Beine nor hospital personnel smelled alcohol on Koehler's breath, a significant amount of time had elapsed, and Koehler passed the only field sobriety test Beine was able to administer. Beine's findings in his accident report (Ex. D), that Koehler lost control of the motorcycle due to his inexperience and excessive speed are against any inference that Beine sought to protect Koehler from the civil consequences of his conduct. Even if Beine's investigation could be viewed as slipshod to the point of recklessness, in the absence of duty neither he nor the City has any liability to Lamp.

IV.

For the reasons discussed above, defendants' motion for summary judgment is **granted**. The Clerk of Court shall enter judgment dismissing plaintiff's complaint.⁵

IT IS SO ORDERED.

Dated this _____ day of December, 2000.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE

 $^{^5}$ In their summary judgment motion defendants ask for attorney's fees and costs. 42 U.S.C. § 1988. The issue has not been briefed by the parties. Moreover, any such request should be by separate post-judgment motion with supporting documentation. Fed. R. Civ. P. 54(d)(2)(A), (B); LR 54.2(a).